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IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,

Petitioners,

v.

TODD ROKITA, *ET AL.*,

Respondents.

On Writs of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICI CURIAE THE BRENNAN CENTER FOR JUSTICE; DEMOS: A NETWORK FOR IDEAS & ACTION; LORRAINE C. MINNITE; PROJECT VOTE; AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF PETITIONERS

[PHOTO ID LAW LACKS JUSTIFICATION]

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INTEREST OF THE AMICI[1]

The Brennan Center for Justice at NYU School of Law (the "Brennan Center") is a nonpartisan institute dedicated to a vision of effective and inclusive democracy. Through its Voting Rights and Elections project, the Brennan Center seeks to protect rights to equal electoral access and full political participation. The project has extensively addressed issues relating to alleged voter fraud and methods for preventing it, tracking the national experience with legislation relating to election fraud, co-authoring three major reports on the subject,[2] and

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[1] Pursuant to Rule 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici curiae and their counsel, made a monetary contribution to its preparation or submission. The parties have filed letters consenting to the filing of any amicus curiae brief with the Clerk of the Court.

[2] *See* Justin Levitt, *The Truth About Voter Fraud* (Oct. 2007), http://www.truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf ("*Truth About Voter Fraud*"); Brennan Center & Michael McDonald, *Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General* (Dec. 2005), http://www.brennancenter.org/dynamic/subpages/download_file_35010.pdf; Brennan Center & Spencer Overton, *Response to the Report of the 2005 Commission on Federal Election Reform* (Sept. 19, 2005), *available at*

participating as counsel or amicus in a number of federal and state cases involving voting and election issues. The Brennan Center has participated as amicus in constitutional challenges to statutes requiring photo identification ("photo ID") as a condition for in-person voting in Georgia and Albuquerque, New Mexico, as well as before the court of appeals in this case.

Demos: A Network for Ideas & Action ("Demos") is a non-partisan public policy research and advocacy center. Its Democracy Program focuses on removing barriers to political participation, especially those affecting traditionally disfranchised populations such as communities of color and low-income citizens. In 2003 Demos published a report by Lorraine C. Minnite and David Callahan entitled *Securing the Vote: An Analysis of Election Fraud* (updated most recently in September 2007) that is widely recognized as the most comprehensive survey available of the extent of voter fraud in U.S. elections.

Lorraine C. Minnite is an assistant professor in the Department of Political Science, Barnard College, Columbia University in New York City. She has written and provided testimony on the incidence of fraud in elections, and is currently finishing a book on the subject. She is co-author of the voter fraud study published by amicus Demos, referred to above, and cited by the district court in this case.

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http://www.brennancenter.org/dynamic/subpages/download_file_47903.pdf.

Project Vote is a non-partisan, non-profit organization dedicated to voter participation in the election process. It assists low-income, minority citizens to register to vote. It has a strong interest in ensuring that the individuals it registers are able to vote and has actively worked to reduce barriers eligible voters face when attempting to register and vote.

People for the American Way Foundation ("PFAWF") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. It has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect the voting rights of all eligible citizens. PFAWF regularly participates in civil rights litigation, and has participated in litigation to protect the right to vote and prevent the disenfranchisement that occurs when restrictive voter ID laws are enforced.

SUMMARY OF THE ARGUMENT

The district court and court of appeals, while acknowledging that Indiana had no record of voter impersonation fraud at the polls, erroneously relied upon unfounded assertions about the existence of such voter impersonation fraud elsewhere in the nation as a basis to uphold Indiana's photo ID requirement. In this brief, amici examine the reports relied on by the district court and the court of appeals, as well as nationwide studies of voter fraud. We show that, in fact, there is no more evidence that polling-place impersonation fraud is a problem outside Indiana than there is in Indiana.

Prior to its enactment of the photo ID law, Indiana already had in place less onerous and more appropriately tailored identification methods, as well as severe criminal penalties to deter impersonation fraud. Moreover, forty-eight states, the District of Columbia and the federal government currently use identification methods that provide less onerous alternatives to photo identification. Absent evidence that polling-place impersonation fraud is a problem in Indiana or anywhere else, Indiana cannot show that there was any need to impose the additional burdens of a photo ID requirement to prevent such fraud.

As the court of appeals acknowledged, a photo ID requirement imposes burdens mainly on Indiana's most disadvantaged citizens—people "low on the economic ladder"[3]—who make up most of the citizens who do not already possess a driver's license or other acceptable photo identification, and at least some of whom, the court of appeals notes, will be deterred from voting by these burdens.[4] As the court also acknowledged, voters in this demographic group "are more likely to vote for Democratic than Republican candidates."[5] Hence, careful scrutiny of Indiana's asserted interest was needed to ensure that the photo ID requirement is not simply the latest device in a

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[3] *Crawford* v. *Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007).

[4] *Id.*

[5] *Id.*

long history of voting requirements aimed at suppressing the vote of politically weak or voiceless minorities and a pretext for obtaining a partisan electoral benefit.

The district court and court of appeals failed to provide anything approaching careful scrutiny—whether denominated "strict" or "heightened"—to Indiana's claimed need to require photo ID to prevent impersonation fraud. Instead, they relied on documents that in fact refute the existence of impersonation fraud; unconfirmed hearsay reports that have been discredited by formal investigations; unsupported speculation; and supposed "perceptions" and fear of voter fraud that are unsupported by any evidence and that are easily manipulated. Under our constitutional system the fundamental right to vote cannot be taken away by unfounded "perceptions" of a majority, whether measured by vote or by opinion poll.

As Judge Wood observed in dissenting from the court of appeals' denial of *en banc* rehearing, "the 'facts' asserted by the state in support of its voter fraud justification were taken as true without examination to see if they reflected reality."[6]

This brief shows that in reality, polling-place impersonation fraud is not a problem and that a photo ID requirement is not needed to prevent it.

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[6] *Crawford* v. *Marion County Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (*en banc*) (Wood, J., dissenting from denial of *en banc* reconsideration).

ARGUMENT

INDIANA'S PHOTO ID REQUIREMENT IS AN UNNECESSARY RESPONSE TO THE EXTREMELY UNLIKELY AND UNSUBSTANTIATED THREAT OF POLLING-PLACE IMPERSONATION FRAUD

Burdick v. *Takushi*, 504 U.S. 428 (1992), requires that, in assessing the constitutionality of election regulations, courts must balance "the character and magnitude" of the burdens on plaintiffs' voting rights "against the *precise interests* put forward by the State" and "the extent to which those interests make it *necessary* to burden the plaintiffs' rights." 504 U.S. at 434 (quotation marks and citation omitted) (emphasis added). Election laws that impose severe burdens on voters are subjected to strict scrutiny. *See id.* But even when a law's burdens are less than severe, *Burdick* does not contemplate application of the deferential "rational basis" test applicable to social and economic legislation.[7] Rather, in such circumstances, *Burdick*

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[7] *See, e.g., Reform Party of Allegheny County* v. *Allegheny County Dep't of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (*en banc*) (election laws imposing less than severe burdens are analyzed under an "intermediate level of scrutiny"); *McLaughlin* v. *N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995) ("a regulation which imposes only moderate burdens could well fail the [*Burdick*] balancing test when the interests that it serves are minor, notwithstanding that the

requires the state to demonstrate an "important regulatory interest" and that regulations addressing this interest are "reasonable" and "nondiscriminatory." 504 U.S. at 434.[8]

States, of course, have "a compelling interest in preventing voter fraud." *Purcell* v. *Gonzalez,* 127 S. Ct. 5, 6-7 (2006). But the broad concept of voter fraud is not the "precise interest" that *Burdick* requires be evaluated here. A photo identification requirement addresses only one type of alleged voter fraud: the impersonation of a registered voter at the polls. It is not a remedy for absentee ballot fraud, ballot tampering, voting from two addresses, vote buying or other voter fraud. This critical distinction was repeatedly ignored by the courts below. Moreover, because Indiana already had voter identification methods in place before it enacted the photo ID requirement in 2005, the issue is whether Indiana's interest in preventing polling-place impersonation

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regulation is rational"); *New Alliance Party* v. *Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991) ("Although . . . the burden imposed . . . is not insurmountable, . . . plaintiffs are due to be granted the relief requested because the interests put forth by the defendant do not adequately justify the restriction imposed.").

[8] For this reason, the district court's use of the deferential test of *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955), to evaluate the Indiana voter ID law was error. *See Indiana Democratic Party* v. *Rokita*, 458 F. Supp. 2d 775, 829 (S.D. Ind. 2006).

fraud justified replacing those earlier methods with a more stringent identification requirement that increases the burdens especially for eligible voters who currently lack a photo ID and must obtain one to vote.

The circumstances here warrant careful examination of that interest. Absent evidence that Indiana's prior identification methods were insufficient to prevent polling-place impersonation fraud, and that it was therefore "necessary" to place additional burdens on voters, the interest advanced by Indiana is suspect. As the court of appeals recognized, the burdens of the photo ID requirement fall mainly on low-income citizens who are the most likely to lack such IDs. *See Crawford*, 472 F.3d at 951. And as the court of appeals also acknowledged, the photo ID requirement will discourage at least some of those people from voting. *Id.* This disparate impact on the voting rights of low-income citizens—a group that is disproportionately made up of people of color[9]—increases the need for caution. *See Vieth* v.

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[9] *See, e.g.*, Matt A. Barreto, *et al.*, *Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters*, 2007 American Political Science Ass'n Annual Conference 1 (Sept. 1, 2007) (on file with the author) ("immigrant and minority voters were consistently less likely to have each form of identification" required under voter ID laws); M.V. Hood & Charles S. Bullock, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute* 19 (April 2007), http://electionlawblog.org/

Jubelirer, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring) (when laws threaten to exclude minority groups from the political process, courts should "err on the side of caution"); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (heightened scrutiny is appropriate when laws distinctly burden "discrete and insular" minority groups that lack sufficient numbers or power to seek redress through the political process).

Moreover, as the court of appeals acknowledged, a significant majority of such low income citizens vote Democratic. *See Crawford,* 472 F.3d at 951. In such circumstances, "applying heightened scrutiny helps to ensure that . . .

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archives/GA%20Voter%20ID%20%28Bullock%20%26%20Hood%29.pdf ("Registered voters are significantly less likely to possess a driver's license if they are from minority groups, especially blacks and Hispanics, and if they are older."); John Pawasarat, *The Drivers License Status of the Voting Age Population in Wisconsin*, University of Wisconsin—Miwaukee (2005), http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf (noting that "[l]ess than half (47 percent) of Milwaukee County African American adults and 43 percent of Hispanic adults have a valid drivers license compared to 85 percent of white adults"; that "only 26 percent of African Americans and 34 percent of Hispanics [have] a valid license compared to 71 percent of young white adults"; and that "23 percent of persons aged 65 and over do not have a . . . drivers license or a photo ID").

[electoral] limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions." *Clingman* v. *Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring in part and concurring in the judgment).[10]

Careful scrutiny of Indiana's asserted interest shows that polling-place impersonation fraud is not a

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[10] Neither *Timmons* v. *Twin Cities New Party*, 520 U.S. 351 (1997), nor *Munro* v. *Socialist Workers Party*, 479 U.S. 189 (1986), supports a different conclusion. *Timmons* held that "elaborate, empirical evidence of the weightiness of a state's interest" was not needed to justify a ballot-access restriction that "did not restrict the right of a [party] or its members to vote for anyone they like." 520 U.S. at 363, 364. But here Indiana provides *no* empirical justification for a law that *does* directly restrict the right to vote of its most disadvantaged citizens. *Munro* sustained a ballot-access restriction, despite no evidence that it addressed an existing problem, because "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight, rather than reactively, *provided that the response is reasonable and does not impinge on constitutionally protected rights*." 479 U.S. at 195-96 (emphasis added). Indiana's law does "impinge on constitutionally protected rights" and, as we show, is not reasonable because less burdensome laws have proven adequate to prevent polling-place impersonation fraud.

problem and that Indiana's photo ID requirement is not needed to prevent it.

A. Polling-Place Impersonation Fraud Is Highly Unlikely And Exceedingly Rare

The record contains no evidence of polling-place impersonation fraud in Indiana: the State conceded that it was unaware of any incidents of attempted or successful impersonation fraud in Indiana; that no one in Indiana history has been indicted for impersonation fraud; and that no evidence of impersonation fraud was presented to the Indiana legislature during the debate over the photo ID law. *See Rokita*, 458 F. Supp. 2d at 792-93.

Without citing a single fact, the court of appeals nevertheless concluded that the "notorious examples of Florida and Illinois," as well as Michigan, Missouri and Washington State, provide evidence—"though not much"—that polling-place voter impersonation is a problem and that it is no less likely to occur in Indiana. *Crawford*, 472 F.3d at 954. But the record, in fact, demonstrates that such fraud is not a problem in the states listed by the court of appeals or anywhere else in the United States.

1. None of the Examples Cited by the Court of Appeals Indicates That Polling-Place Impersonation Fraud Is a Genuine Problem

FLORIDA: The court of appeals never explains why Florida is a "notorious" example.

Perhaps this refers to Florida's problems in the 2000 Presidential election. But those problems had nothing to do with impersonation fraud: Florida was "notorious," among other things, for poor ballot design, antiquated election machinery, and the exclusion of eligible voters from the registration rolls.

There are only two references to Florida in the record. The first is an article from the Miami Herald discussing extensive problems with absentee ballot fraud, vote buying, and voting by ineligible non-residents in a 1997 Miami election. The only suggestions of impersonation fraud in the article are statements by voters confronted with allegations that they voted in districts where they did not reside, and who responded by saying someone must have voted in their names. The article offers no suggestion that these unconfirmed allegations of impersonation involved polling-place impersonation, rather than absentee ballot fraud or clerical errors. *See Rokita*, 458 F. Supp. 2d at 826 & n.78 (citing, *inter alia*, State's Ex. 10 (R. 83, Att. 2)). Tellingly, this 1997 election was overturned on the basis of absentee ballot fraud, without any reference to polling-place impersonation. *In re the Protest of Election Returns & Absentee Ballots in the Nov. 4, 1997 Election for the City of Miami*, 707 So. 2d 1170, 1172 (Fla. Dist. Ct. App. 1998).

The second reference to Florida is a citation to a study by Lorraine C. Minnite and David Callahan entitled *Securing the Vote: An Analysis of Election Fraud* (2003) ("2003 Minnite Study"). *See Rokita*, 458 F. Supp. 2d at 794 (citing State Ex. 6 (R. 82, Att. 3)). This study contains no reference to polling-place

impersonation fraud in Florida; it discusses absentee ballot fraud in Miami's 1997 mayoral primary and refers to Florida's massive disenfranchisement of eligible, mostly African-American voters in the 2000 Presidential election whose names were erroneously put on felony lists. *See id.* at 39-40.

ILLINOIS: The court of appeals never explains why Illinois is "notorious." The only item in the record concerning Illinois is a 1982 newspaper article describing allegations of fraud in the 1982 gubernatorial election. *See Rokita*, 458 F. Supp. 2d at 794 (citing State Ex. 13 (R. 83, Att. 5)). The article's main focus is absentee ballot fraud and ballot tampering by election officials. While this article from a quarter of a century ago refers to allegations of voting in Chicago in the name of deceased persons—so-called "ghost voting"—the article gives no specific examples of any ghost votes and does not indicate whether the unproven allegations involved in-person, rather than absentee voting, or are a reflection of clerical errors. (*See* the discussion of Michigan, immediately below.)

MICHIGAN: There is nothing in the record or the district court's opinion about any election fraud in Michigan. There were reports of voting irregularities in Michigan in 2004 (not reflected in the record), but these reports indicate the unreliability of reports of impersonation fraud. They include allegations of 132 votes allegedly cast by dead people. However, a follow-up investigation to the initial report indicated that all of these votes involved absentee ballots, 124 of the 132 incidents were incorrectly reported, and no ballots were actually cast by a deceased voter after

the voter had died. *See* Kelly Chesney, *Special Letter: Claims That the "Dead" Voted Were Wrong*, Detroit News, Mar. 5, 2006. Moreover, it appears that in Michigan, as elsewhere, claims of ghost voting are often the result of clerical errors, as when election clerks mistakenly record a vote under the wrong name in post-election record keeping, or have a voter sign the poll book entry of a voter with a similar name. *See* Lisa Collins, *In Michigan, Even Dead Vote*, Detroit News, Feb. 26, 2006 ("It's impossible to say whether [purported cases of ghost voting] are names used by someone else to cast fraudulent votes or whether they simply represent clerical errors . . . . Among the most common mistakes occur when election workers record a vote under a similar name, or confuse voters with their parents or other relatives."); *see also* Van Smith, *Election Nights of the Living Dead*, Baltimore City Paper, June 22, 2005 (discussing likely mistakes involving, *e.g.*, voters with different middle initials and a son confused with his deceased father of the same name).[11]

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[11] That publicized cases of alleged impersonation fraud often prove baseless upon investigation is illustrated by the district court's reliance on reports of ghost voting in Georgia. *See Rokita*, 458 F. Supp. 2d at 493 (citing State Ex. 12 (R. 83, Att. 4)). The newspaper article relied on by the district court recounted lurid tales of ballots cast from the grave, including a vote by one Alan Jay Mandel. Further investigation revealed no fire behind the smoke, however: the Georgia Secretary of State determined, in fact, that the votes attributed to

MISSOURI: The district court cited stories concerning voter fraud in Missouri. *See, e.g.*, *Rokita*, 458 F. Supp. 2d 794 (citing State Ex. 13 (R. 83, Att. 5)). None of the sources cited by the district court, however, points to any evidence that the alleged impersonation fraud in Missouri was accomplished *in-person* rather than absentee. *See* John Fund, *Stealing Elections* 64 (2004) (State Ex. 2 (R. 79, Att. 1)); 2003 Minnite Study at 43 (State Ex. 6 (R. 82, Att. 3)); Statement of Sen. Kit Bond (State Ex. 7 (R. 82, Att. 4)). Moreover, these allegations were part of a litany of claims of widespread voter fraud in the 2000 election in St. Louis that since have been shown to be almost entirely specious. According to the 2003 Minnite Study, the Missouri Secretary of State's investigation and an investigation by the St. Louis Post Dispatch disclosed such massive errors in official records and so many wrongful accusations of fraud that the "alleged voter fraud scandal in St. Louis

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Mr. *Mandel* had actually been cast by one Alan Jay *Mandell*, who was alive and well. As the Secretary stated, "a subsequent check of the records by Fulton County staff revealed that the media account was erroneous." Secretary of State Cathy Cox, *The 2000 Election: A Wake-Up Call for Reform and Change* 11 n.3 (Jan. 2001), http://www.sos.state.ga.us/acrobat/elections/2000_election_report.pdf; *see also* Greg Palast, *The Wrong Way to Fix the Vote*, Wash. Post, June 10, 2001; *Common Cause/Georgia* v. *Billups*, 406 F. Supp. 2d 1326, 1366 (N.D. Ga. 2005) (noting absence of evidence of polling-place impersonation fraud in Georgia).

looks more like a case of managerial ineptitude and under-funding, and poor implementation of the [National Voter Registration Act] [by] St. Louis and Missouri election officials." 2003 Minnite Study at 42-43. This conclusion was later dramatically confirmed. After completion of an F.B.I. investigation, the Department of Justice issued no indictments for voter fraud of any kind. Instead, "[t]he Justice Department threatened the Board [of Elections] with a lawsuit for abusing the voting rights of thousands of eligible St. Louis voters by illegally purging their registration records in violation of the National Voter Registration Act. It was these illegal purges that created . . . the appearance of election irregularities." Lorraine C. Minnite, *An Analysis of Voter Fraud in the U.S.* 16 (2007), http://www.demos.org/pubs/analysis_voter_fraud.pdf; *see also Truth About Voter Fraud* at 24-26.

Most recently, the Supreme Court of Missouri, in striking down a photo ID law under the state constitution, quoted with approval the findings of the trial court that:

> No evidence was presented that voter impersonation fraud exists to any substantial degree in Missouri. In fact, the evidence that was presented indicates that voter impersonation fraud is not a problem in Missouri.

Weinschenk v. *State of Missouri*, 203 S.W. 3d 201, 217 (Mo. 2006); *see also United States* v. *Missouri*, No. 05-4391-CV-C-NKL, 2007 WL 1115204, at *10 (W.D. Mo.

Apr. 13, 2007) (noting that the United States had not "shown that any voter fraud has occurred" in Missouri in action alleging violations of National Voter Registration Act).

The Missouri Supreme Court concluded that the "[p]hoto ID requirement could only prevent a particular type of fraud that does not occur in Missouri." *Weinschenk*, 203 S.W. 3d at 218.

WASHINGTON STATE: A comprehensive investigation of alleged voter fraud was conducted in Washington State after the bitterly contested 2004 gubernatorial election. *See Rokita*, 458 F. Supp. 2d at 793, 826 (citing State Ex. 3 (R. 79, Att. 2)); *Borders* v. *King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), *reprinted in* 4 Election L.J. 418 (2005). But this investigation refutes—rather than supports—claims that polling-place impersonation fraud is a problem. Out of 2,812,675 ballots cast, the investigation uncovered only 19 incidents that could conceivably have involved impersonation fraud, involving alleged voting in the name of the deceased. *Id.* at 420, 423. Subsequent investigations indicated that most of these ghost voting incidents involved absentee ballots—not polling-place impersonation fraud—and therefore would not have been prevented by a photo ID requirement. *See* Phuong Cat Le & Michelle Nicolosi, *Dead Voted in Governor's Race*, Seattle Post-Intelligencer, Jan. 7, 2005 (noting that only one of eight investigated cases of ghost voting involved a voter actually voting at the polls, while the other seven cases involved absentee ballots). A

county official stated that the cases being investigated were "not indications of fraud." *Id.*[12] Furthermore, even if one or two ghost voting incidents did involve polling-place impersonation fraud, such incidents can be prevented by each State updating its voter rolls on a regular basis as required by federal law.[13] Another article cited by the district court indicates that election officials in Washington had not yet regularly updated the voter rolls by 2004. *See Rokita*, 458 F. Supp. 2d at 826 n.78 (citing State Ex. 15 (R. 83, Att. 7)).

2. *The Additional Evidence Cited by the District Court and Other Studies Show That Polling-Place Impersonation Fraud Is Not A Genuine Problem*

The additional evidence relied on by the district court and other studies also show that polling-place impersonation fraud is not a problem anywhere in the nation.

MINNITE STUDY: The district court's reliance on the 2003 Minnite Study is puzzling. *See*

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[12] As noted, claims of in-person impersonation fraud are frequently shown to merely reflect clerical errors and poor record keeping. *See supra* at 12.

[13] Under the Help America Vote Act of 2002 ("HAVA"), states are required to implement centralized registration lists, update them regularly, and remove ineligible registrants. *See* 42 U.S.C. § 15483(a)(4).

Rokita, 458 F. Supp. 2d at 793-94 (citing State Ex. 6 (R. 82, Att. 3) (2003 Minnite Study)). That study is one of the most comprehensive studies of voter fraud allegations to date,[14] but it compels a conclusion exactly opposite to that reached by the district court. The study found that voter fraud of any kind is "very rare," is not more than a "minor problem" and "rarely affects election outcomes." 2003 Minnite Study at 4, 17. Notably absent from the study is any evidence of polling-place impersonation fraud. According to the study, even where election fraud allegations have received significant attention in the news media, the allegations almost invariably proved baseless. *Id.* at 17, 40-43.

To the limited extent fraud has been detected, the study concludes, it generally takes the form of organized fraud such as vote buying, use of fraudulent absentee or mail-in ballots, ballot box stuffing, or wrongful purging of registration rolls to exclude eligible voters. *Id.* at 14-15. Instances of these types of fraud far outweigh incidents of individual fraud. *Id.* Most importantly, the study concludes that the wrongful *disenfranchisement of voters* is a "far bigger problem" than voter fraud. *Id.* at 15.

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[14] In the study, Minnite and Callahan reviewed news and legal databases and interviewed attorneys general and secretaries of state in 12 states, representing about half of the national electorate, about incidences of election fraud from 1992 to 2002.

DOJ REPORT: The district court also mistakenly relied on a Department of Justice ("DOJ") report on voting fraud. *See Rokita*, 458 F. Supp. 2d at 793 (citing State Ex. 2 (R. 79, Att. 1)). The report does not contain a single reference to impersonation fraud. An updated version of that report, which describes DOJ's investigation of election fraud since 2002, confirms that impersonation fraud is not a threat to the integrity of elections. *See* Press Release, DOJ, *Fact Sheet: Department of Justice Ballot Access and Voting Integrity Initiative* (July 26, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/July/06_crt_468.html ("DOJ Report").[15] The DOJ Report describes 86 convictions for election-related misconduct over a nearly five-year period, but not a single one of these convictions involved impersonation fraud. *See id.*; *see also* Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. Times, Apr. 12, 2007. The report describes incidents of vote buying, improper use of personal information by local officials, various campaign finance convictions, and harassment to keep voters from the polls. None of these crimes could be prevented by requiring voters to show a photo ID.

WISCONSIN: The district court cited a year-long joint federal and state investigation into an alleged scheme to alter the result of the 2004 election

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[15] *See also* DOJ, *Election Fraud Prosecutions & Convictions*, Oct. 2002 — Sept. 2005, *available at* http://www.truthaboutfraud.org/pdf/doj%20election%20fraud%20prosecutions.pdf.

in Wisconsin, but this investigation also disclosed no evidence of impersonation fraud. *See Rokita*, 458 F. Supp. 2d at 793-94 (citing State Ex. 4 (R. 79, Att. 3) (*Preliminary Findings of Joint Task Force Investigating Possible Election Fraud* (May 10, 2005), *available at* http://www.wispolitics.com/1006/election fraud.pdf)). Indeed, the investigation showed very little evidence of any other type of voter fraud, although it did turn up severe administrative and record keeping problems with the Milwaukee elections board. *See id.* at 1; *see also* Greg Borowski, *A New Push To Repair Elections*, Milwaukee Journal-Sentinel, May 15, 2005 (administrative problems and "jumbled records made confirmation [of voter fraud allegations] a near impossibility"). The few incidents that were substantiated involved registration fraud, double voting and voting by ineligible persons with felony convictions, not impersonation fraud at the polls. *See* Steve Schultze, *No Vote Fraud Plot Found*, Milwaukee Journal-Sentinel, Dec. 5, 2005.

SABATO AND FUND: The district court cited two books discussing allegations of voter fraud generally, *see Rokita*, 458 F. Supp. 2d at 793-94 (*citing* Sabato & Simpson, *Dirty Little Secrets* 292 (1996) ("Sabato"); Fund, *Stealing Elections* 64 (2004) ("Fund")), but these books contain few allegations of voting irregularities that could even conceivably have been remedied by a photo ID requirement. Sabato, for example, describes thousands of incidents of possible absentee ballot fraud and numerous problems plaguing California's registration rolls. Sabato at 291-92. But it cites only a single hearsay allegation of attempted polling-place impersonation

fraud—and that was foiled without a photo ID requirement. *Id.* at 292.

Likewise, Fund retails numerous reports of voting by ineligible persons with felony convictions and double voting—problems for which requiring a photo ID is no solution. Fund at 64.[16] And, as noted, *see supra* at 13, though Fund parrots allegations of alleged voting in the name of deceased persons in Missouri, he offers no evidence that any of these involved in-person, rather than absentee, voting or that they were not the result of clerical errors. Fund at 64. Moreover, allegations of impersonation fraud in Missouri have been thoroughly discredited. *See supra* at 13.

CARTER-BAKER COMMISSION: The district court also relied on the report of the Carter-Baker Commission on Federal Election Reform[17] for the proposition that impersonation fraud occurs, and that photo ID requirements are necessary to prevent it. *See Rokita*, 458 F. Supp. 2d at 794 (citing State Ex. 1 (R. 82, Att. 1) (Commission on Federal Election

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[16] A review characterizes Fund's book as filled with "distortions and half truths" and provides a point-by-point refutation of many of Fund's claims. *See* Media Matters, *John Fund's Book on Voter Fraud Is a Fraud* (Oct. 31, 2004), http://mediamatters.org/items/printable/200411010001.

[17] The Carter-Baker Commission was not a commission of the federal government; it was an independent project organized by American University.

Reform, *Building Confidence in U.S. Elections* (Sept. 2005) ("Carter-Baker Report"))). The Commission cites no credible evidence of impersonation fraud, instead simply referring to the since-discredited reports of such fraud in Milwaukee and Washington State. *Compare* Carter-Baker Report at 2-4, 18 *with supra* at 14-15, 17-18. Moreover, as one of the dissenters notes, the Commission "did not call as witnesses many of the most established experts on the issue [of voter ID requirements]. A commission's reliance on anecdotes and political sound bites—rather than empirical data, testimony by top experts, and rigorous analysis—undermines its credibility." Spencer Overton, *Establishing Procedures for Credible Advisory Commissions* (2005), http://www.carterbakerdissent.com/procedure.php.[18]

Finally, reliance on the Carter-Baker Report for support of Indiana's photo ID law is misplaced: the Commission's co-chairs, President Carter and

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[18] Deficiencies are found in every other article and report cited by the district court. *See Rokita*, 458 F. Supp. 2d at 793-94 (citing State Exs. 2-18 (R. 79; R. 82, R. 83)); *id.* at 826 (citing State Exs. 3-18). Many are newspaper reports of "double voting" by voters at multiple addresses. *See, e.g.*, State's Exs. 5, 8 (R. 82 Atts. 2, 5). Other exhibits detail voting by persons with felony convictions, some of whom may have been ineligible. *See, e.g.*, State's Exs. 3, 4, 7 & 9 (R. 79, Att. 3; R. 82 Att. 4; R. 83, Att. 1). These problems can only be prevented by an accurate registration list, not by a photo ID requirement.

Secretary Baker, condemned Georgia's initial photo ID law as "discriminatory" because "it was costly or difficult for poor Georgians." Jimmy Carter and James A. Baker III, *Voting Reform Is in the Cards*, N.Y. Times, Sept. 23, 2005. While they proposed a nation-wide, uniform photo ID, known as the REAL ID, as a requirement for in-person voting, they did so in the hope of remedying the problems created by allowing individual states—like Georgia—to impose ID requirements. They hoped that the discriminatory burdens of a photo ID requirement could be eliminated if states were obliged "to seek out citizens to both register voters and provide them with free ID's that meet federal standards," through a host of affirmative and energetic activities. *Id.* President Carter's and Secretary Baker's vision ignores the burdens on low-income voters even if the ID itself is free.[19] In any event, the Indiana law—which is even more stringent than Georgia's—is the antithesis of their vision.[20]

COHHIO STUDY: A study of alleged fraud in Ohio which is not in the record further confirms that impersonation fraud is not a problem. *See* Coalition of Homelessness and Housing in Ohio & League of

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[19] *See* Indiana Democratic Party Petitioners' Br. at 13-16.

[20] For a full critique of the Carter-Baker Report, including its endorsement of REAL IDs, *see generally* Brennan Center & Spencer Overton, *Response to the Report of the 2005 Commission on Federal Election Reform* (Sept. 19, 2005).

Women Voters Coalition, *Let the People Vote* 1 (2005), http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf. Researchers interviewed the Director or Deputy Director of each of the state's 88 county Boards of Elections and concluded that voter fraud as a whole was an "exceedingly rare" occurrence, as evidenced by the fact that, out of a total of 9,078,728 votes cast, there were only four reported instances of ineligible persons voting or attempting to vote in 2002 and 2004, confined to three of the state's 88 counties. *Id.* at 2. The report does not indicate why the four persons were ineligible, or whether polling-place impersonation fraud was involved.

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In sum, the national evidence—including the very evidence relied on by the courts below—suggests that the type of voting fraud that may be remedied by a photo ID requirement is virtually nonexistent: the "problem" of voter impersonation is not a real problem at all.

The court of appeals nevertheless speculated that the absence of evidence of impersonation fraud might be explained by the "endemic underenforcement of minor criminal laws" and the "difficulty of apprehending a voter impersonator." *Crawford*, 472 F.3d at 953. But guesswork is misplaced where fundamental rights are at stake: courts should decide voting-rights cases on the basis of "facts rather than speculation." *Purcell*, 127 S. Ct.

at 8 (2006) (Stevens, J., concurring).[21] Further, the more reasonable explanation for the absence of evidence of polling-place impersonation fraud is that, because such fraud is extremely risky, exposes the perpetrator to severe penalties,[22] and has very little payoff, it rarely occurs.[23]

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[21] The court of appeals' statement regarding the "underenforcement of minor criminal laws" is contradicted by the fact that, since 2002, the Department of Justice has given priority to, and devoted vast resources to, the investigation and prosecution of voter fraud. *See* DOJ Report (noting establishment in 2002 of initiative requiring "expanded efforts to address election crimes" and placing "a high priority on the investigation and prosecution of election crimes"). In spite of these efforts, DOJ has found not one instance of polling-place impersonation.

[22] Voter impersonation in a federal election can result in five years' maximum imprisonment and $10,000 maximum fines. *See* 42 U.S.C. § 1973i(c). Under Indiana law, impersonation fraud is punishable as a Class D felony by three years maximum imprisonment, and $10,000 maximum fines. *See* Ind. Code §§ 3-14-2-12, 35-50-2-7(a).

[23] Notably, the court of appeals posited that some voters are likely to be discouraged from voting rather than incur the time and trouble to obtain a photo ID, because a single vote supposedly has a low "instrumental value"—*i.e.*, voters believe their individual vote will not determine the election's outcome. *See Crawford*, 472 F.3d at 951. But if

The court of appeals also opined that Indiana's inflated voter registration rolls created an "acute danger" of impersonation fraud. *Crawford*, 472 F.3d at 953. But central to Congress's enactment of HAVA was the conviction that states' maintenance of accurate, updated registration lists is the best remedy for the dangers created by inflated, outdated registration lists. Indiana citizens should not be burdened with photo ID requirements to remedy a speculative threat created by Indiana's failure to comply with federal law. The court of appeals dismissed Congress's remedy as ineffectual, without any basis in fact and contrary to the views of Congress and election experts. *See, e.g.*, 148 Cong. Rec. S10491 (2002) (statement of Sen. Bond) (noting that HAVA "requires states to set up a computerized, statewide voter registration system to maintain the names of all registered, eligible voters [and eliminate the risk that rolls will contain] the names of people who have left the jurisdiction, who are not eligible to vote because of their status as a felon, who are deceased or who are not eligible to vote in that jurisdiction for any number of reasons").

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that is true, impersonation fraud is likely to be discouraged by the severe penalties for such conduct, because there would be little reason to incur such great risks for a payoff of such low "instrumental value."

B. Alleged Perceptions Or Fears of Voter Fraud Do Not Justify Indiana's Photo ID Requirement

The district court advanced an alternative justification for the photo ID requirement that is equally unpersuasive: Indiana's interest in responding to public perceptions or fears of voter fraud. In upholding the photo ID requirement, the district court credited "several polls indicating voter concern about election fraud and support for photo identification requirements at the polls." *Rokita*, 458 F. Supp. 2d at 794. The court's reliance on these public opinion polls was wrong for several reasons.

First, none of the cited polls reflects any public concern with polling-place impersonation fraud. *See Rokita,* 458 F. Supp. 2d at 794 (citing State Exs. 22 – 24 (R. 84, Atts. 2-4)). A Gallup poll relied on by the district court showed that two-thirds of Americans had little confidence in the fairness of the 2000 Presidential election—and that 68% of African Americans felt "cheated" after that election. *See Rokita,* 458 F. Supp. 2d at 794 (citing State Ex. 23 (R. 84, Att. 3) (Wendy W. Simmons, *Black Americans Feel Cheated by Election 2000*, Gallup News Service, Dec. 20, 2000)). Much of this sentiment reflected concerns that valid votes would not be counted and was entirely unconnected to any threat of impersonation fraud. *See* Simmons at 6. The only poll relied on by the district court which manifested public support for photo ID laws does not identify which of those surveyed were voters who already had drivers licenses and other acceptable photo IDs and for whom a photo ID requirement imposes virtually

no burden, and which, if any, were disadvantaged voters who do not have photo IDs and who must incur the burdens of obtaining one to vote. *See Rokita*, 458 F. Supp. 2d at 794 (citing State Ex. 22 (R. 84, Att. 2)). The majority of voters already have acceptable photo IDs. It is therefore not surprising that many of them would unthinkingly support such a requirement without considering the effects it might have on voting by disadvantaged citizens who lack photo IDs.

Second, "perceptions" and fears of voter fraud are subject to manipulation and hence unreliable.[24]

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[24] The perception of voter fraud is very different than the appearance of corruption that is the basis for upholding campaign finance restrictions. As this Court recognized, the ability to regulate activity protected by the First Amendment must be supported by evidence justifying the precise fear, which must in turn justify the regulation. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and then later in *McConnell* v. *Federal Election Commission*, 540 U.S. 93 (2003), the Court repeatedly cited the extensive factual record of corruption that Congress had compiled to justify the regulation of particular acts of campaign finance, and even then it sufficed only where it imposed merely a "marginal restriction" on protected activity. *See Buckley*, 424 U.S. at 20-21; *McConnell*, 540 U.S. at 124-25, 129-31, 145-50. In contrast, there is no factual record of any impersonation fraud supporting an appearance of such fraud that would justify Indiana's regulation. Moreover, with respect to campaign finance regulation, the "appearance of corruption is inherent in a system

As the Missouri Supreme Court held in striking down Missouri's photo ID law, even where such perceptions are real, if it upheld the law based on "the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used as a mechanism for further burdening the right to vote or other fundamental rights." *Weinschenk*, 203 S.W. 3d at 218.

This Court has stated that "[c]onfidence in the integrity of our electoral process is essential to the functioning of our participatory democracy" and that "voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell*, 127 S. Ct. at 6. But nothing could be more damaging to confidence in the integrity of our electoral process than if such fears were generated by baseless claims of voter fraud that are being exploited to gain support for unnecessarily stringent identification requirements that suppress voting by low income and minority citizens and are seen as a "not-too-thinly-veiled attempt to discourage election day turnout by certain folks believed to skew Democratic." *Crawford*, 472 F.3d at 954 (Evans, J. dissenting).[25]

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permitting unlimited financial contributions." *Buckley*, 424 U.S. at 27. But there is no inherent appearance of impersonation fraud in voting by eligible voters who lack photo IDs but have other identification acceptable in virtually every state.

[25] For concerns about the manipulation of claims about voter fraud, *see, e.g.*, Tova Wang, *A Rigged*

Finally, under our Constitution, the fundamental rights of the most vulnerable members of our society may not be stripped away by majority vote or opinion polls. *See, e.g.*, *Lucas* v. *Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-37 (1964) ("[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections. A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.") (quotation marks omitted); *id.* at 737 n.30 ("It is too clear for argument that constitutional law is not a matter of majority vote.") (quotation marks and citation omitted).

C. A Photo ID Requirement Is Not Needed To Prevent Possible Impersonation Fraud

Forty-eight states and Congress have adopted laws for identifying voters that provide less onerous alternatives to a photo ID, as did Indiana's laws until 2005. The absence of evidence of impersonation fraud shows that these laws, together with criminal laws severely penalizing such fraud, are adequate to prevent impersonation fraud. Hence, Indiana has neither a compelling nor an important interest justifying the added burden that acquiring the requisite photo ID imposes on the vulnerable voters most likely to lack one.

Report on U.S. Voting?, Wash. Post, Aug. 30, 2007; *see also* Ian Urbina, *Panel Said To Alter Finding on Voter Fraud*, N.Y. Times, Apr. 11, 2007.

1. *Indiana's Policies for Identifying Voters Prior to the Adoption of the Photo ID Requirement Provided an Adequate Alternative to Photo ID*

Prior to 2002, most states, including Indiana, did not require *any* documentary proof of identity. *See, e.g.*, Electionline.org, *Election Reform: What's Changed, What Hasn't and Why 2000-2006* 13 (2006), *available at* http://www.electionline.org/Portals/1/Publications/2006.annual.report.Final.pdf ("Electionline Study"). Under Indiana's voting procedures, any questions about identity were addressed by comparing the voter's signature at the polls to a photocopy of her signature in the registration records. See Ind. Code § 3-11-8-25 (2002). If her signature were challenged, the voter could affirm by affidavit that she was qualified to vote in that precinct and then cast a regular ballot. *Id.* § 3-11-8-22.

Indiana revised its election code in 2003 (effective in 2004), *see* Ind. P. L. 209-2003, § 134, in response to the federal Help America Vote Act of 2002 ("HAVA"), *see generally* 42 U.S.C. § 15301, *et seq*. Congress passed HAVA in response to the deeply flawed 2000 election and the widespread problems that occurred when administrative errors resulted in eligible voters being left off the registration rolls—and denied the right to vote. Among other provisions, HAVA requires that first-time voters who register by mail, and whose registration information cannot otherwise be verified against other government databases, must confirm their identities through a variety of widely available documents: a current and valid photo ID, a current utility bill, bank statement,

government check or paycheck, or another government document that shows the name and address of the voter. *See id.* § 15483(b)(2), b(3)(B).

In 2003, Indiana adopted HAVA's requirements for first-time voters who register by mail, who were then required to provide some form of documentary identification—including a range of non-photo ID showing the name and address of the voter. *See* Ind. Code § 3-11-8-25 (2004). Despite the lack of any evidence of actual or threatened impersonation fraud rendering these ID provisions inadequate to prevent such fraud, just two years later, in 2005, the Indiana legislature mandated that all in-person voters (except nursing home residents voting in their nursing homes) display a photo ID issued by the state or federal government and bearing an expiration date. The absence of polling-place impersonation fraud shows that the imposition of a new, stringent photo ID requirement is not needed to prevent polling-place impersonation fraud.

It is also pertinent that Indiana's law is at odds with less burdensome alternatives adopted by the federal government in HAVA, and by forty-eight of Indiana's sister states and that these states, like Indiana, have not had an impersonation fraud problem.

2. *Less Onerous Methods of Voter Identification in Other States Provide Adequate Alternatives to Photo ID*

In 48 states and the District of Columbia, a photo ID is not the exclusive requirement for casting

a ballot that will count. These states provide alternative means for confirming voters' identities, and as the absence of any meaningful evidence of impersonation fraud indicates, these alternatives are sufficient to protect the integrity of elections.

As noted, prior to 2002, most states did not require voters to show *any* documentary identification before voting in person. *See supra* at 27. And although all states have now implemented HAVA's identification requirements and request some form of documentary identification—including non-photo ID—from first-time voters who registered by mail and have not been "matched" against government databases, *see* Electionline Study at 17; *supra* at 27-28, besides Indiana, only one other state—Georgia—currently requires all voters to produce photo identification before their ballots will be counted. *See generally* National Conference of State Legislatures, *State Requirements for Voter Identification* (Feb. 1, 2007), http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm ("NCSL Study").

Twenty-three states and the District of Columbia require the documentation enumerated in HAVA only from first-time voters registering by mail, *see* NCSL Study; *see also* Electionline Study at 17,[26]

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[26] These states utilize a variety of mechanisms to verify the identities of other voters. *See generally* Electionline.org, Voter ID Laws (Oct. 17, 2006), *available at* http://www.electionline.org/Default.aspx?tabid=364 ("Voter ID Laws"); NCSL Study.

while Kansas and Pennsylvania require the ID specified in HAVA from all first-time voters.

The remaining twenty-five states require all voters—whether first-time or "repeat" voters—to produce some documentary ID. Eighteen of these states[27] request that all voters produce some form of documentary identification, but accept both photo and non-photo ID. *See generally* Electionline Study at 17; Voter ID Laws.[28] Only seven states—Florida,

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Some states permit these voters to verify identity by signing a registration card or book for comparison with a signature on a master list. *See, e.g.*, Nev. Rev. Stat. § 293.277; N.J. Stat. Ann. § 19:31a-8. Other states confirm voters' identities by having the voter orally recite or affirm identifying information. *See, e.g.*, Mass. Gen. Laws ch. 54, § 76; Neb. Rev. Stat. § 32-914; Utah Code Ann. § 20A-3-104.

[27] Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, New Mexico, North Dakota, Ohio, South Carolina, Tennessee, Texas, Virginia, and Washington.

[28] The list of acceptable forms of ID varies, but almost every state's list includes options for voters that are either contained in the text of HAVA, or closely related to its model. *See generally* Voter ID Laws. Various states have augmented HAVA's list of acceptable IDs with additional, widely available alternative forms of documentary proof. *See id.* Moreover, in many states, voters lacking documentary identification can prove identity

Georgia, Hawaii, Indiana, Louisiana, Michigan, and South Dakota—require voters to display a photo ID when they vote in person, but five of these seven states provide meaningful alternatives that allow voters lacking photo IDs to cast votes that are counted. Only Indiana and Georgia fail to provide a non-photo ID alternative to voters lacking a photo ID.[29]

The five remaining states with laws that request photo IDs of all voters provide voters who

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through non-documentary means, such as reciting unique identifying information or signing an affidavit. *See generally* Voter ID Laws; NCSL Study; *see also, e.g.*, N.M. Stat. §§ 1-12-7.1, 1-1-24; Conn. Gen. Stat. § 9-261(a).

[29] After initially enjoining Georgia's original photo ID law, *see Common Cause/Georgia* v. *Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005), a federal district court subsequently rejected the litigants' standing to challenge an amended version of the law, *see Common Cause/Georgia* v. *Billups*, 504 F. Supp. 2d 1333 (N.D. Ga.), *appeal filed* No. 07-14664C (11th Cir. 2007). The court nevertheless opined in dicta that the amended law was constitutional, noting, *inter alia*, that Georgia had amended the law in an attempt to minimize the burdens on voters; did not require voters to provide birth certificates to obtain free IDs; and conducted an extensive outreach and education campaign targeting voters likely to lack photo IDs—measures absent in Indiana. *See Common Cause/Georgia*, 504 F. Supp. 2d at 1378-80.

lack photo ID with various less burdensome alternatives. A Michigan voter lacking a photo ID may sign "an affidavit to that effect before an election inspector and [will] be allowed to vote" a regular ballot. Mich. Comp. Laws § 168.523. South Dakota voters without a photo ID may also vote after completing an affidavit. *See* S.D. Codified Laws § 12-18-6.2. And in Louisiana, a voter lacking photo ID may vote after signing an affidavit so long as she provides either a current voter registration certificate or other information requested by the election commissioners of her precinct. *See* La. Rev. Stat. Ann. § 18:562(A)(2).

Hawaii's voter identification statute provides that "[e]very person shall provide identification if so requested," Haw. Rev. Stat. § 11-136, and the website of Hawaii's Office of Elections makes clear that all voters "will be asked to . . . verify . . . identity with a picture ID." Hawaii Office of Elections, *How to Vote at the Polling Place* (Nov. 9, 2007), http://www.hawaii.gov/elections/voters/howtovote.htm. Hawaii's official manual for polling-place procedures, however, directs poll workers to accept various forms of non-photo ID, and makes clear that if a voter is unable to produce documentary ID, she is simply asked to recite her date of birth and home address, and if the voter's responses match the information contained in the poll book, she may vote a regular ballot. *See* Hawaii Office of Elections, Chairperson and Voter Assistance Official's Manual 58-59 (2006); NCSL Study.

Finally, in Florida, voters lacking photo ID may sign an affidavit, and Florida will count the ballot if the signature on the affidavit matches that

on the registration form: the voter is not required to make an additional trip to an election office or to return to the polls with ID, as in Indiana. *See* Fla. Stat. §§ 101.043(2), 101.048(2)(b).

* * *

There is no evidence that polling-place impersonation fraud represents a genuine problem anywhere in the United States, and less onerous alternatives have proven more than adequate to prevent it. The additional hurdle to voter participation erected by Indiana's photo ID requirement cannot be justified as a reasonable, nondiscriminatory remedy to prevent impersonation fraud. Indiana's imposition of this additional obstacle to electoral participation that primarily burdens disadvantaged voters is an unnecessary and unreasonable means of preventing impersonation fraud. It, therefore, violates the First and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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Respectfully Submitted,

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